IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.01.2006

CORAM :

THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN
AND
THE HONOURABLE MR.JUSTICE P.P.S.JANARTHANA RAJA

Tax Case (Appeal) No.386 of 2001

V.Dhivakaran ..Appellant

Vs

The Deputy Commissioner of Income Tax,
Central Circle - II(3),
No.121, Nungambakkam High Road,
Chennai-600 034. ..Respondent

Appeal under Sections 260-A of the Income Tax Act, 1961 against Income Tax Appellate Tribunal, "C" Bench, Chennai in IT (SS) A No.187/Mds/1998 for the block period 1986-87 to 1996-97. PAN/GIR NO. 26717 - D Assessment year Blcok period Asst. years 1987-88 to 1997-98 up to 24.09.1996 date of order 03.12.1998 on the file of the Deputy Commissioner of Income Tax Circle II (3) Chennai - 34.

For Appellant : Mr.C.Natarajan,
Senior Counsel for
Mr.N.Inbarajan &
Mr.S.Shanmugam

For Respondent: Mr.T.Ravikumar
Standing Counsel for I.T.

JUDGMENT

P.P.S.JANARTHANA RAJA J.

The Appellant Assessee has filed this appeal under Section 260-A of the Income Tax Act against the order of the Income Tax Appellate Tribunal, Chennai, 'C' Bench in IT (SS) No.187/Mds/1998 dated 26.02.2001 and the appeal was admitted in terms of the following substantial questions of law:

> 1. Is the assessment, along with the order of the Income Tax Appellate Tribunal, liable to be set aside as illegal because no notice under Section 158.BC was issued after an order of transfer by notification dated 13.4.1998 of the Commissioner of Income Tax,

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

Trichy which itself took effect only from 16.4.1998?

2. Is the order of assessment dated 3.12.1998 barred by limitation, especially when the Income Tax Appellate Tribunal had not found the mandatory period of limitation saved by anything stated in sub-section (2) of Section 158.BE of the Income Tax Act?

3. Should the Income Tax Appellate Tribunal ought to have held that the earlier order dated 30.9.1996 under Section 127 of the Act was illegal and void, and not merely irregular, especially when it was patently wrong, non-speaking and in violation of rules of natural justice being open to collateral attack so that the Revenue itself abandoned the said proceedings, and there was nothing to save anything done thereunder?

2. In respect of Question No.3, the counsel appearing for the Appellant submitted that he is not pressing the same. The facts lead to the remaining two questions of law are as under:

(i) The premises of the Appellant was raided under Section 132 of the Act on 02.04.1996 and cash, jewellery, documentation etc. came to be seized. The Assessing Officer issued a notice under Section 158-BC of the Act on 06.12.1996 and the Appellant Assessee on 14.12.1996, received the notice. The Appellant Assessee, however, did not filed any return, in response to the said notice. The Assessing Officer proceeded to frame the assessment and in this process, issued Questionnaire on various dates, which were not responded. The Commissioner of Income Tax, Tamil Nadu V, by his notification in C. No.2040 (4) /96-97 dated 09.09.1996 issued a notice to the Appellant Assessee proposing to transfer the cases under Section 127 of the Income Tax Act to the Assistant Commissioner of Income Tax, Central Circle II(6), Madras, while seeking the objections on or before 20.09.1996. Acknowledging the notice which was served on 19.09.1996, the Appellant Assessee by letter dated 25.09.1996 objected to the transfer on grounds of hardship. By proceeding dated 30.09.1996, the Commissioner of Income Tax, Tamil Nadu V, Chennai, notified the transfer of the Appellant's case to the Assistant Commissioner of Income Tax, Central Circle II (6), Madras. On 06.12.1996, a notice under Section 158-BC of the Income Tax Act was issued by the Assistant Commissioner of Income Tax, Central Circle II (6), to the Appellant, calling upon the Appellant to file the returns.

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

(ii) The Appellant filed W.P. No.4782/97 before this Court, challenging the order of transfer dated 30.09.1996 on which, notice was ordered on 07.04.1997, but no interim order was passed. On 02.09.1997, the learned Single Judge of this Court, granted interim stay of further proceedings in pursuant to the order of transfer of the Appellant Assessee Case in W.M.P. No.8001 of 1997. The High Court made the interim stay granted on 02.09.1997 absolute on 04.09.1997. Further, on a request made by the Senior Counsel for the Department, seeking liberty to proceed afresh in terms of Section 127 of the Act, by issue of fresh notice and to pass fresh orders, the said liberty was given to the respondent Department to which the Appellant Assessee had no objection. On 23.09.1997, a notice under Section 127 of the Act was issued by the Commissioner of Income Tax, Trichy, who has jurisdiction over the Appellant Assessee by virtue of creation of new Commissionerate at Trichy with effect from 11.06.1997 to transfer the proceeding to the jurisdiction of the Assistant Commissioner of Income Tax, Central Circle II(3), Chennai which was objected to. Thereafter, by notification No.1/98-99 dated 13.04.1998, the Commissioner of Income Tax, Trichy passed an order under Section 127 of the Act, transferring the case of the Appellant Assessee from the file of the Assistant Commissioner of Income Tax, Investigation Circle No.II, Trichy to the Assistant Commissioner of Income Tax, Central Circle II(3), Chennai. The said notification was stated to take effect from 16.04.1998. On 06.11.1998, an order was passed in W.P. No.4782/97 wherein the transfer proceeding dated 30.09.1996 was dismissed as infructuous in view of the fresh order passed on the case.

(iii) The Assessing Officer called upon the Appellant Assessee with a questionnaire dated 16.11.1998 on the issues concerning the Block Assessment to submit his reply by 23.11.1998. The Appellant also filed his reply on 23.11.1998 conveying his inability to give his submissions on various poser, because the time was too short and raised points of assessment being barred by time. The contention of the Appellant Assessee being barred by time, was based on two basic points. First point was that the High Court had stayed the proceedings initiated by the transferree Officer and the Assessing Officer should have completed the assessment by 30.09.1997. The second point was that the second Notification was made effective from 16.04.1998 and the Assessing Officer should have concluded his assessment within 28 days. The Assessing Officer observed that the High Court had considered only the stay proceedings initiated by him based on the notification issued earlier, but had not quashed the notification. He further observed that the order of High Court staying assessment proceedings, to the officer from whom the case was transferred. On the second issue raised, the Assessing

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

Officer observed that the High Court had directed the Department to place its report before it after issue of fresh notification and on compliance of this direction, the High Court had vacated the stay on 06.11.1998. He observed that from this date of vacating the stay, the Assessing Officer would get 28 days that expires on 4.12.1998. The Assessing Officer called upon the Appellant Assessee to place his submissions to the various points noted by him vide his letter of inquiry dated 24.11.1998, in response to which the representative of the Appellant Assessee attended on 27.11.1998 and prayer for inspection of the seized material and Assessing Officer had granted the permission to peruse the seized records. The Assessing Officer noted that on 01.12.1998 a letter from the officer of the Chartered Accountant was filed without enclosing the authority in its favour and accordingly ignored the said letter. The Assessing Officer accordingly concluded the assessment with reference to provisions of Section 144 of the Act and estimated the undisclosed income at Rs.2,44,91,270/-. The said order was passed on 03.12.1998 under Section 158-BC read with Section 144 of the Income Tax Act.

(iv) Aggrieved by the said order, the Appellant Assessee preferred an appeal against the order of the Assessing Officer before the Income Tax Appellate Tribunal in which, inter alia the following grounds were urged:-

1. that the Block Assessment order passed on 03.12.1998 was barred by limitation of one year governed by Section 158.BE (1) (a) of the Income Tax Act, not being extended by Explanation I therein; and

2. that there was no proceeding initiated under Section 158.BC of the Act pursuant to the order passed on 13.04.1998 and therefore the assessment passed on 03.12.1998 was illegal.

(v) The Income Tax Appellate Tribunal passed an order on 26.02.2001, and rejected the grounds as above stating:

1) that eventhough the transfer of the case ordered on 13.04.1998 under Section 127 of the Income Tax Act was effective from 16.4.1998, the earlier proceedings was only irregular which was cured and the assessing authority had 28 days only in framing the assessment, especially when the asssessing authority at Trichy who had the jurisdiction over the case, could not have proceeded with the assessment because there was an earlier order of transfer dated 30.09.1996 under Section 127 of the Act;

2) that the conferment of jurisdiction by earlier orders dated 30.09.1996 under Section 127 of the Act was only containing a procedural defect of not affording opportunities to the Appellant, and the High Court had not and perhaps could not have held that the assessing authority who had initiated the assessment proceedings earlier to 13.04.1998 had no jurisdiction to proceed

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

further;

3) that the Department could not restart the proceedings even after the notification dated 13.04.1998 without the express sanction of the Court, and therefore the assessing authority could not recommence the proceedings, and immediately the jurisdiction was conferred on 16.04.1998 and

4) that the provision introduced with effect from 01.04.1998 would permit the continuation of the proceedings without reissue of any notice which indicated the wisdom of the law makers as to the necessity or otherwise for fresh notice, which therefore was not required in the case.

(vi) In respect of the best judgment addition, the Income Tax Appellate Tribunal has set aside the assessment with a direction to the Assessing Officer to reconsider the entire issue on merits. Aggrieved against the said orders of the Tribunal, the Appellant Assessee preferred this present appeal and raised the above substantial questions of law.

3. The counsel for the Appellant contended that the High Court of Madras has stayed the assessment proceedings initiated by the Assessing Officer to whom the jurisdiction was given by the notification of September 1996 and this he submitted impliedly restored the jurisdiction with the Assessing Officer, who had the jurisdiction based on the territory aspect. He further submitted that the stay granted by the High Court also indicated that the proceedings till that stage was illegal and it should mean that the appellant assessee was never served with any notice under Section 158.BC of the Act. It is also further submitted that the High Court had directed issue of fresh notification by the Department after considering the objections of the Appellant Assessee to such a transfer of the case because it is a requirement of law. The Revenue complied with this direction of this Court and had called the Appellant Assessee to place his objections and after considering those objections, the notification dated 13.04.1998 made effective from 16.04.1998 was issued giving the jurisdiction to the present Assessing Officer. Further he contended that the necessity of issuing a fresh notification always arose when the direction notification was bad in law. He contended that the earlier notification was bad in law, and the proceedings that followed such illegal notification are also bad in law and would have to be treated as not enforceable in law. The notification issued in 1996 was found by the High Court, as issued by not complying with the mandatory requirements of law and therefore, had called for a fresh notification. He submitted that it is a clear indication that it was only after the issue of the fresh notification that the Assessing Officer has jurisdiction over the case, and therefore it must be held that the issue of the

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

notification in 1996 and all that followed it, are illegal and deserve to be quashed. He further submitted that the raid was on 24.09.1996 and in accordance with the provisions of Section 158.BE (1) (a) of the Act, the Assessing Officer would get one year to frame the assessment and in a normal course by 30.09.1997, the Assessing Officer must have made the assessment and despite the intervention by the High Court, and granting stay on 02.09.1997, the time available to frame the assessment expired on 30.09.1997. Hence the assessment made on 03.12.1998 was beyond time and must be quashed. It was submitted that the notification issued in 1996 suffered from basic legal infirmity and after this was redressed, a fresh notification become a necessity and this clearly shows that the Assessing Officer who completed the assessment, got the jurisdiction only from 16.04.1998, by which time, the time for framing of the assessment had already expired. The grievance of the Appellant Assessee being satisfied under law by the Revenue by hearing his objections and issuing a fresh notification, the writ filed by the Appellant Assessee had no other purpose and the Appellant Assessee submitted that the writ be treated as infructuous. He contended that both the notifications, i.e. one issued in September 1996 and in April 1998, could not be effective simultenaously and the latter was not issued superceding the one issued in 1996 and by the issue of a subsequent notification, the Revenue must be held as having realised that the earlier notification was invalid in the eye of law. Hence, it should be treated as never issued and further pleaded that proceedings logically from this point onwards, the only possible conclusion was then the jurisdiction always remained with the Assessing Officer at Trichy and he should have completed the assessment by 30.09.1997, which having not done by him, the same should be held that the assessment was barred by time.

4. Further reference also made of the order of stay by the High Court wherein it was observed that it would be open to the Appellant Assessee to challenge the notification order afresh and this was in recognition of the right of objection against an invalid order of the Revenue. He submitted that the submission of the Appellant Assessee before the High Court that the writ be treated as infructuous could not be held against him and revived the earlier notification and that this aspect clearly shows that the earlier notification died by action of law. The counsel also placed his alternative arguments on the assumption that the proceedings of Assessing Officer who concluded the assessment are proper. He pleaded that under Chapter XIV-B of the Act that covers assessment consequent to search, has a mandate in Section 158.BC of the Act and that is, Assessing Officer must issue a notice to the Assessee. He submitted that Assessing Officer got his jurisdiction on 16.04.1998 but he never issued any notice

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

under Section 158.BC of the Act. He insisted that the assessment framed without issue of the notice, that is mandatory requirement is bad in law and must be quashed and also further submitted that even on the assumption that the proceedings are treated as continuing, the Assessing Officer would get only 28 days from 16.04.1998 and this expired in May 1998 and viewing from this point also, the conclusion has to be that the assessment was barred by time.

5. The learned counsel for the Revenue submitted that the issues concerning the assessment being barred by time had been dealt with by lower authorities are in accordance with law and he also stated that the order passed by the assessing officer was within a time allowed under the statute and further submitted that the transfer of case for the convenience of tax administration is an Administrative Act only and would not open for question before any Court. He also further submitted that in this case, the Court had also ruled that the coordination of investigation is a good ground for such transfer. He also contended that the Allahabad High Court in Hindustan Transport Co. Vs. I.A.C. (1991) 189 326 had held that the allocation of functions is a procedural matter only and hence the strict construction of the section applies only to a charging provision and not a machinery provision for which he relied on the Apex Court in the case of C.I.T. Vs. National Taj Traders reported in 121 ITR 535 and he also further relied on the decision of the Supreme Court Judgment reported in Kapurchand Shrimal Vs. C.I.T. (1981), (131 ITR 451) and submitted that the High Court had directed the issue of a notification after affording opportunity to the assessee which procedure was overlooked initially and thereby the notification issued in 1996 only, suffered a procedural irregularity. He contended that whenever any one pleads for an opportunity, the Courts had only remanded it for compliance of the said procedure but never had rendered the earlier action as invalid in the eye of law, but always held it as an irregularity that could be corrected. He relied on the Bombay High Court decision in C.I.T. Vs. Bharatkumar Modi (2000), (246 ITR 693) and on the Kerala High Court decision in C.I.T. Vs. N.Krishnan (1999) (235 ITR 386). He finally submitted that a Court should never be a party to an unfair advantage that the assessee tries to gain, because it would result in neutralising the proceedings and he contended that it is the view of Supreme Court in Grindlays Bank Ltd. Vs. I.T.O. (1980) (122 ITR 55) and he also finally submitted that the provisions contained in Section 127 (4) of the Act might be an answer to the issue in appeal.

Heard the Counsel's contentions on the legal issues have been considered very carefully. The learned single Judge made the interim stay absolute on 04.09.1997 in W.M.P. No.8001/97 in W.P. No.4782/97. Originally the

https://hcservices.ecourts.gov.in/hcservices/

interim stay was granted on 02.09.1997. While passing the order, this Court expressly stayed further proceedings by the Transferee Officer pursuant to the impugned proceedings (i.e.) original notification transferring the case of the assessee. While granting stay, the High Court did not quash the earlier notification of transfer dated 30.09.1996. When the assessment proceeding by the Transferee Officer was stayed, the Transferor Officer did not get back the jurisdiction as the notification dated 30.09.1996 was not struck down or quashed by the Court. In such an event, the only person having jurisdiction over the Appellant Assessee was the Transferee Officer for whom the assessment proceeding, by him, were stayed by the High Court. Therefore the contention of the counsel for the appellant that the Transferor Officer should have initiated and completed the Block Assessment proceedings is baseless. The stay was vacated only when the High Court dismissed the Writ Petition of the Appellant on 06.11.1998. Therefore there were 28 days left after the writ petition of the appellant assessee was dismissed on 06.11.1998 and the assessment has become time barred only on 04.12.1998. The date of search was on 24.09.1996. The Assessing Officer has to pass orders within one year from the end of the month in which raid was conducted. Section 158.BE (1) (a) deals with limitation. In the present case, the officer has to pass order on or before 30.09.1997. The limitation starts from end of the month of the raid (i.e.) 30.09.1996. The only exception prescribed in the Act is that if there is any stay order, the period of stay order will have to be excluded for the purpose of computation and exclusion clause is prescribed under Section 158 BE (1) (a) read with Explanation 1 (i). In this case, interim stay was granted on 02.09.1997 and the same was made absolute on 04.11.1997 and later, the writ petition was dismissed on 06.11.1998, and hence there was 28 days left for completing the assessment after excluding the stay period. The said 28 days commences from the date on which the writ petition was dismissed on 06.11.1998. The last date for completing the assessment was on or before 04.12.1998. In this case, the assessment order was passed on 03.12.1998 and hence the Block Assessment made is within a time and not barred by limitation.

6. Further, the learned counsel for the appellant filed a typed set, containing Supreme Court and High Court judgments, and they are as follows:

1.AIR 1953 SC 95 (Straw Board Manufacturing Co. Vs. Gutta Mills).
2.AIR 1959 SC 198 (Siraj Ul Haq Vs. Board of Waqf).
3.AIR 1964 SC 1300 (Dhirendranath Vs Sudhir Chandra).
4.AIR 1975 SC 2065 (Supdt. Of Taxes Vs. O.N. Trust).
5.AIR 1987 SC 1161 (Gokak Patel Volkart Vs. CCE, Belgaum).
6.1998 (3) SCC 540 (J.K. Cotton Spinning Vs. CCE).
7.257 ITR 198 (Peerulal, Mohanlal Vs. CIT).

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

8.2004 (2) SCC 579 (N.C. Dhoundilal Vs. UOI)

We have gone through the above judgments and the said judgments are rendered under various statutes. In the present case, we are concerned with the exclusion of stay period for purpose of calculating the limitation as provided under Section 158.BE (1) (a) read with Explanation 1 (a) of the Income Tax Act. Hence, the judgments relied on by the counsel for the appellant have no relevance and are not of any assistance to support the case of appellant in the present case. Therefore we answered the second question of law against the assessee.

7. In respect of first question regarding no notice under Section 158.BC was issued after an order of transfer notification dated 13.04.1998 of C.I.T., Trichy which took effect from 16.04.1998, the Section 127(4) is very relevant and the same reads as follows:-

"The transfer of a case under Sub-Section (1) or Sub-Section (2) may be made at any stage of the proceedings, and shall not render necessary the reissue of any notice already issued by the Assessing Officer or Assessing Officers from whom the case is transferred".

The above section makes it clear that even where a case is transferred from one officer to another in the middle of the proceeding, it is not necessary to reissue a notice to the assessee. In the instant case, the case already stands transferred to the Assessing Officer at Chennai and he had issued a notice under Section 158.BC of the Act. He had been reconferred with the powers under Section 127 and therefore, the claim of the appellant assessee that fresh notice should have been issued after the notification of 16.04.1998 is frivolous and hence rejected.

8. In the foregoing reasons, we have answered both the questions of law against the Appellant and hence dismiss the above Tax Case. Accordingly, the T.C.M.P. No.42 of 2001 is closed. No costs.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

To

1.The Assistant Registrar
Income Tax Appeallate Tribunal III Floor
Rajaji Bhavan, Besant Nagar, Madras 90

2. The Deputy Commissioner of Income Tax,
Central Circle – II(3),
No.121, Nungambakkam High Road,
Chennai-600 034.

+ one cc to Mr. Pushya Sitaraman, Senior Standing Counsel
Income Tax Dept. SR NO. 1502
• one cc to Mr. N. Inbarajan, Advocate sr no. 1399

Tax Case (Appeal) No.386 of 2001

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/